U.S. Department of Labor

Office of Administrative Law Judges
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Issue Date: 11 March 2004

CASE NO.: 2003-LHC-1047

OWCP NO.: 07-153661

IN THE MATTER OF:

HAROLD WASHINGTON, JR.,
Claimant

v.

LOUISIANA DOCK CO., INC.,
Employer

and

AMERICAN LONGSHORE MUTUAL ASSN., LTD.,
Carrier

APPEARANCES:

Diane R. Lundeen, Esq.,
On behalf of Claimant

R. Scott Jenkins, Esq.
On behalf of Employer/Carrier

Before: Clement J. Kennington
Administrative Law Judge

DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901 *et. seq.* (2001) brought by Harold Washington, Jr. (Claimant) against Louisiana Dock Co., Inc. (Employer) and American

Longshore Mutual Association, Ltd. (Carrier). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held before the undersigned on October 30, 2003, in Metairie, Louisiana.

At the hearing both parties were afforded the opportunity to adduce testimony, offer documentary evidence and submit post-hearing briefs in support of their positions. [1] Claimant testified, called Cassandra Washington and Bryan Landry, and introduced 8 exhibits, which were admitted, including: various Department of Labor filings; Claimant's wage records; Claimant's medical bills; and the deposition of Dr. Hubbell. Employer called Dale Roach and introduced 24 exhibits, which were admitted, including: medical records and deposition of Drs. Steiner, Rozas, McCain; medical records of Dr. Fleming, Dr. Hubbell, the Family Doctors, Crescent City Physical Therapy, Ochsner Hospital and Clinic, West Jefferson Medical Center and LSU Health Sciences Center; vocational records, labor market survey and deposition of Dr. Larry Stokes; Claimant's personnel records, affidavit of accident and summary of benefits.

Post-hearing briefs were filed by the parties.[2] Based upon the stipulations of the parties, the evidence introduced my observation of the witness demeanor and the arguments presented, I make the following Findings of Fact, Conclusions of Law, and Order.

I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. An accident occurred on June 28, 1999;

2. Claimant's leg injury was in the course and scope of his employment;

3. An employer-employee relationship existed at the time of Claimant's accident;

4. Employer was advised of the accident on June 28, 1999;

5. Employer filed Notices of Controversion on August 8, 2000 and December 13, 2001;

[1] References to the transcript and exhibits are as follows: Trial transcript- Tr.__; Claimant's exhibits- CX __, p.__; Employer exhibits- EX __, p.__; Joint exhibits- JX __, p.__.

[2] Claimant submitted a 49-page, double spaced brief on January 7, 2004. Employer submitted a 36-page, double spaced brief on January 7, 2004.

6. An informal conference was held on February 21, 2002;

7. Claimant suffers a 10% permanent impairment to his lower extremity;

8. Employer paid Claimant temporary total disability benefits from June 29, 1999 through July 6, 1999; from July 9, 1999 through July 16, 1999; and from July 21, 1999 through July 4, 2001, at a rate of $181.09 per week and totaling $18,497.05.

II. ISSUES

The following unresolved issues were presented by the parties:

1. Causation of back injury;

2. The nature and extent of Claimant's disability;

3. Date Claimant reached maximum medical improvement;

4. Claimant's average weekly wage;

5. Employer's liability for past, present and future medical bills;

6. Entitlement to past, present and future indemnity benefits;

7. Interest and attorney's fees.

III. STATEMENT OF THE CASE

A. Claimant's Testimony:

Claimant lives in Harvey, Louisiana, with his wife and daughter. He also has two other children for whom he pays child support.[3] Claimant testified he dropped out of the

[3] On cross-examination Claimant testified he is not current with his child support payments and as a result spent time in jail two weeks before the hearing. He was also convicted of distributing cocaine and spent time in jail for it ten years ago. (Tr. 93, 145).

twelfth grade and began working in fast-food restaurants, although he later held jobs with Orick Vacuums, Southport, Avondale Shipyards and Employer. (Tr. 50-51, 91-92). At Avondale he was an insulator and new electrician helper with no specific training. (Tr. 54-55). At Technical Employment Services, Inc., and EBE, he worked as a tacker. (Tr. 55-56). Claimant then worked at Employer 5 days per week as a laborer; his duties included bagging up scraps for a crane to take away. (Tr. 51-52). Claimant left Employer to work at Southport as a laborer; his primary duty was to grind the edges of beams to smooth them out. He sometimes worked 10-12 hour days at $8 per hour. (Tr. 53).

Claimant testified Employer re-hired him in December, 1998, as a tacker; he also received his rigging license. Claimant worked with a fitter to put up plates, did some welding and primarily worked with Mr. Landry doing most of the rigging at night.[4] (Tr. 54). At the time of the accident, Claimant was working with Landry to rig a toolbox to the crane. Claimant stated his foreman, Hookfin, had assigned them to this job; Hookfin said he would try to get them additional help, but then returned and told Claimant and Landry to continue the job by themselves. Claimant stated he wrapped the chain around the toolbox at the instruction of others, instead of rigging the chain to hooks on either side of the toolbox. When the toolbox was hoisted up, it slid off the chains pinned Claimant's leg against the wall. Claimant testified he tried to jerk or twist himself free, and screamed for help; eventually three of his co-workers, including Mr. Loc, were able to free him. He also signed a notarized affidavit stating he twisted at the waist to try and free himself.[5] (Tr. 57-61; EX 2, p. 5). After the accident, Loc and another person carried Claimant off of the tugboat and placed him in Dale Roach's truck in which he was transported to Ochsner Hospital; he was assisted the entire way.[6] (Tr. 61-62).

Claimant testified the doctor examined his leg and gave him a tetanus shot but determined he did not need stitches. At home, he elevated his leg to reduce the swelling; Claimant was told the toolbox incident caused his leg to swell. Claimant testified further that nerve conduction testing revealed nerve damage in his right leg. (Tr. 62-63). After leaving the emergency room at Ochsner, Claimant briefly treated with Dr. Bendrick, and was eventually sent to a specialist, Dr. Steiner, who he still sees off an on. Dr. Steiner

[4] Claimant received his welder's certificate and was a welder's helper at Employer, although he intended to take the test to become a third-class welder; his accident and injuries prevented this. (Tr. 56-57).

[5] I note this affidavit is dated September 20, 2002, one month after Dr. Hubbell hypothesized if Claimant twisted during his accident he may have aggravated a pre-existing back condition; Dr. Hubbell had clarified he did not know what happened in the accident. (EX 2, pp. 3-5).

[6] Claimant testified Roach is Employer's safety man who was in charge of taking injured workers to the hospital. (Tr. 87).

sent Claimant to physical therapy, but he strained himself causing further swelling in his leg and did not return. (Tr. 64-65).

In addition to treating with Dr. Steiner, Claimant testified he also saw Dr. Rozas, Dr. Hubbell, Dr. Fleming, Dr. McCain, and various other doctors at Charity and Ochsner hospitals. (Tr. 65-66). After Employer cut off compensation, Claimant used his wife's insurance to go to Ochsner, and then went to Charity hospital.[7] Claimant testified he discussed his back problems with Dr. Steiner and Dr. Rozas, because they both told him he was using his cane wrong which caused his hip and low back pain. On cross-examination, Claimant could not remember the exact date he complained to Dr. Steiner about back pains, but he testified it was between July, and September, 1999, when Dr. Steiner corrected his use of the cane. He complained of back pains to Dr. Rozas in November, 1999, and was told again he was using his cane wrong. Claimant also discussed his back pain with Dr. Hubbell and the emergency room doctors; he went to the emergency room on August 25, 1999, in the middle of the night for pain radiating from his lower back into his right leg. On cross-examination Claimant testified he did not go to the emergency room for his extreme back pains until the year 2000 or later. However, he then stated he complained of back pain at Charity hospital on November 30, 1999, to Dr. Rozas on October 25, 1999, and to Dr. Hubbell on December 22, 1999. (Tr. 165-67). (Tr. 66, 69, 93-101, 125-27, 144).

Claimant testified he did not remember the exact time when his back pain started, but he felt symptoms as he became more active. On cross-examination, Claimant testified his back began hurting one month after the accident, around the same time he returned to work at Employer. Too much bending, moving or walking aggravated his back and he had to place his weight on his left leg when standing; sometimes sitting bothered him, but he did not report his back pain to his supervisors or co-workers. (Tr. 69-70, 93, 159). Claimant testified his leg pain level ranged between 5 and 7, on a scale of one to ten; however, it was worse immediately following the accident. He could not say his back was worse right after the accident because he was focusing on his leg pain at that time; he could not say for how long his leg pain overshadowed his back pain. (Tr. 69-70, 114-116). Claimant never had right leg or low back pain before his work accident; however, records from Claimant's family doctor indicated he complained of back pain six months before his work injury. Claimant testified he only visited his family doctor when he was in extreme pain. (Tr. 121-23). Since his work accident, his right leg has given out and he has to catch himself from falling. (Tr. 70-71, 120). Claimant testified the accident and injuries changed his life and limited his activities. He cannot lift heavy items or walk long distances, and driving bothers him. Claimant testified he could not return to welding because he was incapable of climbing a lot of stairs and his doctors have not released him to his former job. (Tr. 85-90, 141-142).

[7] Claimant testified he currently has outstanding bills with Doctor's Hospital, Charity, Ochsner and Dr. Hubbell. He also paid for his prescriptions out of pocket. (Tr. 83-84).

Claimant first returned to work around July 7, 1999, for one or two days but experienced leg pain. He returned and was assigned to welding holes on the dry dock, which he did while sitting down. Again, Claimant stopped working secondary to complaints of pain; he did not return to Employer after July 21, 1999. (Tr. 66-67). Claimant testified he began cutting hair for a living; he was trained at Katie's, having graduated in November, 2001. Claimant started working at Lisha's in August, 2001; he rented a booth for $100 per week and bought his own supplies for about $25 per week and had gross earnings of $200-$250 per week. In December, 2001, he cut hair from home earning about $125 per week, and he opened up his own barber shop in Bridge City in May 2002. (Tr. 71-76). Claimant testified his business went under because he could not earn enough to pay all his expenses. After closing his shop, Claimant worked out of his home and then went to Deluxe Styles in October, 2002, earning $200 per week; he left in January, 2003, because he was not making enough money. (Tr. 76-80).

Claimant testified his pain kept him from standing long, causing him to work slowly and miss school. Even though he was able to sit on a stool when he got tired, he still had physical problems and once his back gave out. Claimant testified he had to cancel appointments because he was in too much pain to work; he was unable to work the typical barber schedule of 12 hours per day. (Tr. 68, 80-81, 165). On cross-examination, Claimant testified he was physically capable of cutting hair; in the six month period preceding the hearing Claimant sought work at two barber shops and he continued to work out of his home. He testified he could probably earn more money at a different job, but he prefers to cut hair because he can work at his own pace. (Tr. 146-48). From May, to September, 2003, Claimant held a part-time, temporary position at AME as a janitor at the New Orleans Greyhound bus station. Only part time work was available and he testified it was a good way to assess if he could physically do the job; he stated the janitor position wore him out.[8] His duties were to sweep, mop, and take out the trash; he earned $6.75 per hour. Claimant testified he had problems with his duties; he had to take many breaks because of his pain and his co-workers did the heavy work. (Tr. 81-83, 91, 123).

On cross-examination Claimant testified he was incapable of working a full-time job because of his back and leg pain, however he never attempted to work full-time. He recalled meeting with Dr. Stokes for a functional capacity evaluation, although he did not know the results. Claimant received a job list from Dr. Stokes in September, 2001, but he did not follow up with them because he enjoyed cutting hair, even though some of the jobs paid more money. At the time of the hearing, Claimant earned $100 per week cutting hair. However, Claimant testified he might be interested in other jobs if he was capable of performing them. (Tr. 148-55, 107, 90). He expressed an interest in being a

[8] On cross-examination Claimant further testified he was too busy taking care of his daughter to get a second job; he made the conscious decision to stay home and care for his daughter. (Tr. 109-11).

cartoonist or working for the post office, although he had not made an attempt to secure his commercial drivers' license. Claimant has not pursued employment other than his job at AME and cutting hair. (Tr. 155-58).

B. Testimony of Cassandra Denise Washington[9]

Mrs. Washington, Claimant's wife of five years, lives with him and their daughter in Harvey, Louisiana; she lived with Claimant at the time of his June, 1999, accident and injury. After the accident, Claimant complained daily of problems with his back, leg, walking, bending and standing for long periods of time; he also experienced weakness and numbness in his leg which caused him to fall down sometimes. Mrs. Washington testified Claimant was quite active before his accident, but afterwards he was restricted in his activities. (Tr. 173-75).

Mrs. Washington testified she attended as many doctor appointments with Claimant as she could, including numerous appointments with Dr. Steiner. She testified Claimant complained of back pain to Dr. Steiner about the same time he was using his cane; Dr. Steiner talked about the possibility of having Claimant use the cane in his other hand. Mrs. Washington stated Claimant's back pains began when he became more active, started to use his cane, underwent physical therapy and returned to work. (Tr. 184-85). Mrs. Washington testified Dr. Steiner suggested Claimant may have hurt his back when he attempted to twist himself free from the toolbox. (Tr. 175-77, 180).

Mrs. Washington testified Claimant began working as a barber in 2001; when he came home he looked tired, sore and had to lay down for relief. Claimant's condition was the same when he worked out of their home. She testified she also had the opportunity to see Claimant when he came home from his janitorial job in 2003; he was very tired, stiff, and could only lie on the sofa in the evening. Mrs. Washington testified Claimant complained of back pain daily; she advised him to tell his doctors of the pain but she did not suggest he tell Employer. She testified Claimant told her he complained of leg and back pain to his supervisors when he returned to work. (Tr. 185, 187-88). Mrs. Washington testified Claimant did not complain about his back before the 1999 accident. (Tr. 177-79). On cross-examination she testified she disagreed with Dr. Steiner's deposition testimony that Claimant did not complain about back pains until June, 2000. She also disagreed with Dr. Steiner's deposition testimony that Claimant's back injury was probably not a result of the June, 1999, incident; she testified she heard Dr. Steiner tell Claimant his back injury was related to his work accident. (Tr. 180-84).

[9] Mrs. Washington was sequestered during Claimant's testimony and that of Mr. Landry. (Tr. 36).

C. Testimony of Bryan Landry

Landry is an assistant manager at Elmwood Marine; he also worked at Employer for three years as a crane operator who did some welding activities. Landry testified he worked at Employer on June 28, 1999, and witnessed Claimant's accident. (Tr. 36-37). He and Claimant were on a Harvey tugboat and were instructed to use equipment to remove a toolbox from the deck of a barge; Landry testified this particular tool box was approximately 3.5 feet long and weighed 500 pounds. They asked their foreman, Charlie Grier, for help removing the toolbox but Grier could not spare any other riggers, so they began rigging the toolbox themselves. Landry testified that as he began to hoist the box and the chains tightened, it slid and jammed Claimant's leg up against a wall. Claimant called for help and tried to free himself but was pinned for about 5 minutes. (Tr. 38-40, 42). A few other workers arrived on the accident scene and were able to free Claimant. Two of them carried Claimant off the boat to seek medical attention for him. (Tr. 41).

On cross-examination, Landry testified Felix Hookfin was his foreman directly responsible for him and Claimant. Landry also testified that moving a toolbox with a crane requires two riggers; however, he stated his supervisor told him there was no other help available and they would have to make the best of the circumstances; he was not told to wait for another rigger or that he and Claimant moved the toolbox in direct violation of orders. (Tr. 43-44). Landry testified he saw Claimant carried off of the vessel onto another barge; he did not see Claimant stand or walk. (Tr. 45-48). Landry testified he did not talk to Claimant after the accident or work with Claimant upon his attempt to return to work. (Tr. 48).

D. Testimony of Edward Dale Roach

In June, 1999, Roach was the safety coordinator for Employer; he knew Claimant and was familiar with his work injury. As safety coordinator all work accidents were reported to him and he had knowledge of a person's status once they have returned to work. (Tr. 189-92). Roach was informed of Claimant's accident when the foreman reported it over the walkie-talkies. He immediately left his office and arrived on the accident scene in approximately three minutes; Claimant had already been moved off the boat onto the work flats when he arrived. (Tr. 192-93). Roach took Claimant to the hospital in his vehicle; they had to walk a total of approximately a couple hundred feet to get from where Claimant was injured to the vehicle. According to Roach's recollection Claimant walked to the car with assistance, but he was not carried. Claimant only complained of leg pain, he did not voice complaints of back pain. (Tr. 193-95).

Roach testified Claimant returned to full duty work one week after his accident. He clarified Claimant was released to sedentary work with restrictions in lifting because of his leg injury. Claimant worked a couple of days before he was sent to industrial

medicine with complaints of pain; on July 15, 1999, he was released to regular duty work. Roach then testified he would defer to Employer's doctor's reports regarding Claimant's physical restrictions and ability to work. Roach testified the normal procedure was for a worker to report pain complaints to his supervisor or foreman who then reported it to Roach. Individual workers can also report pain directly to him. Roach was not aware Claimant made any complaints of back pain. (Tr. 195-98, 202-05).

In Roach's investigation of Claimant's accident, he found "they were attempting to lift an object off an ocean-going tug with a crane." (Tr. 198-99). Roach testified Claimant was the only rigger involved, although the task requires two riggers and a crane operator. In the course of his investigation, Hoofkin informed Roach he told Landry and Claimant to wait until they got a second rigger. Roach testified the second rigger was needed in this situation to prevent the cargo from swinging and banging around. (Tr. 200). On cross-examination Roach clarified the manner in which Claimant and Landry lifted the toolbox was a violation of safety policy, however, he was not there at the time and did not know what exactly Hoofkin said. (Tr. 201-02).

E. Exhibits

(1) Depositions of Robert Steiner, M.D., and Paul J. Hubbell, M.D.

Dr. Steiner is a board certified orthopedic surgeon; he testified by deposition on August 26, and October 21, 2003, and was accepted by the parties as an expert in his field. (EX 4, pp. 1, 5-6; EX 5, p. 1). Dr. Hubbell testified on October 1, 2003; he is board-certified in anesthesiology with a sub-specialty in pain management and was accepted by the parties as an expert in his field. (CX 8, pp. 6, 98). Dr. Steiner began treating Claimant on July 30, 1999, when Claimant presented with radiating pain in his right leg and recurrent swelling of the right leg secondary to being struck in the right leg with a toolbox at work.[10] He used a cane for ambulation. Dr. Steiner initially diagnosed Claimant with contusion and abrasion to the right leg; Claimant did not have any complaints of back pain. He prescribed physical therapy for Claimant.[11] Dr. Steiner next saw Claimant on August 20, 1999, at which time Claimant's leg was mildly swollen and tender; he walked with a mild limp but no longer used a cane. *Id.* at 8-9.

[10] Dr. Steiner treated Claimant a total of nine times, specifically, July 30, August 20, and 25, September 3, and 27, October 12, and November 15, 1999, as well as January 31, and June 22, 2000. He re-examined Claimant on September 25, 2003.

[11] Claimant apparently attended physical therapy sessions at Crescent City Physical Therapy on August 3, 5, 6, 9, 11, 13, 16, 18, 19, 20, 23, 24, 25, 1999, and October 5 and 7, 1999. These records were not submitted into evidence, but the dates were taken from Dr. Stokes' handwritten notes. (EX 21, p. 21).

Dr. Steiner examined Claimant on August 25, 1999, finding tenderness and mild swelling over the mid shaft of the right leg as well as mild warmth to this area. *Id.* at 9. Dr. Steiner testified Claimant's complaints were consistent with his injury, although the prolonged nature of the complaints was unusual. *Id.* at 10-11. An MRI of Claimant's right leg revealed soft tissue trauma but no significant abnormalities within the calf bone or muscle. A bone scan of the right leg did not indicate a fracture. Dr. Hubbell testified he agreed with these interpretations. Claimant returned to Dr. Steiner on September 3 and 27, 1999, complaining of pain and swelling in his right leg. However, Dr. Steiner testified he found no abnormal temperature of the skin or trophic changes of the right foot or leg and only minimal swelling. (*Id.* at 11-13; CX 8, p. 14).

On October 12, 1999, Dr. Steiner noted Claimant was using his cane again and had mild tenderness of the skin over his healed abrasion. Dr. Steiner recommended an EMG and nerve conduction study be performed in both legs which showed only mild slowing of the sural nerve on the right side and no denervation. Dr. Fleming, who performed the tests, felt the results were consistent with an injury to the superficial sensory nerve in the right leg, secondary to trauma; he opined improvement of the symptoms may take several months. Dr. Steiner testified these findings were consistent with Claimant's complaints, and may explain their prolonged nature. (EX 4, pp. 13-15, 41). He diagnosed Claimant with a right leg and nerve contusion with healed abrasions; Claimant was not released to work. *Id.* at 15-16, 40.

At Claimant's November 15, 1999 follow-up appointment, Dr. Steiner found he walked with an exaggerated limp despite using a cane, but the abrasion to his right leg was well healed with only mild tenderness. Claimant's physical therapy reports noted he exhibited symptom magnification. (EX 4, pp. 16-17). However, Dr. Hubbell testified he did not find Claimant to exhibit symptom magnification or to be malingering, explaining Claimant's symptom magnification has been frequently misstated because people with severe pain are not going to put forth as much effort. He also testified worker's compensation patients are significantly less likely to return to work, but Claimant had repeatedly requested Dr. Hubbell return him to normal so he could work. (CX 8, pp. 42-44, 88). Based on relatively normal findings, Dr. Steiner recommended a FCE for Claimant, which was performed January 17, and 19, 2000. Claimant performed at maximum effort and his physical demand level was rated light-medium. Dr. Steiner felt Claimant was capable of returning to work, deferring to the vocational rehabilitation counselor as to whether specific jobs are within Claimant's work restrictions.[12] (EX 4, pp. 16-18, 41-43).

[12] On cross-examination, Dr. Steiner clarified he believed Claimant was capable of the intermediate category light-medium, he was not capable of medium duty work. Specifically, he understood light-medium to be lifting 30 pounds occasionally, lifting 20 pounds frequently and no prolonged walking or standing. (EX 4, pp. 41-43).

Dr. Hubbell first examined Claimant on December 22, 1999, and was provided a history of Claimant's June 28, 1999 work accident in which he was hit in the right hip with the toolbox and subsequently experienced pain from his hip radiating into his right leg.[13] (CX 8, pp. 7, 83). Claimant reported pain in his leg, including supersensitivity to light touch, abnormal skin temperature and sweating of his right leg, along with numbness and pain in his leg. Claimant had attempted physical therapy, but experienced significant pain. *Id.* at 8-9. Dr. Hubbell diagnosed Claimant with causalgia, a partial nerve injury resulting in sympathetic response, and depression secondary to his injury and subsequent inability to work; he did not diagnose a lumbar injury, other than noting Claimant's leg pain extended into his anterior superior iliac spine. Dr. Hubbell recommended a lumbar sympathetic block and physical therapy as the best method to diagnose and improve Claimant's right leg pain, explaining the lumbar sympathetic chain is the L2, L3 and L4, which sends signals down the leg. (*Id.* at 9-11; EX 13, pp. 17-19). Dr. Steiner testified nerve root irritation is usually treated with steroid injections and nerve blocks. (EX 5, pp. 40-41).

Dr. Steiner first became aware of Claimant's complaints of back pain in the reports from Dr. Hubbell and Dr. Rozas. At his January 31, 2000 appointment, Claimant did not complain of back pain and Dr. Steiner opined any back injury was not related to Claimant's June 28, 1999 work accident. Moreover, regardless of the back injury, Dr. Steiner maintained his opinion Claimant could perform work at the light-medium level as determined by the FCE. (EX 4, p. 19; EX 5 at 19-21).

Claimant's lumbar sympathetic pain blocks were performed February 25, and March 31, 2000, and relieved his pain for a few days, indicating he had sympathetic pain problems. Dr. Hubbell prescribed physical therapy to improve Claimant's activity and extend the relief from the nerve blocks. (CX 8, pp. 12-14, 16-17). On March 15, 2000, Claimant presented with discoloration and significant temperature difference in his right foot, pain out of proportion to the stimulus in his right foot and signs of sympathetic pain. *Id.* at 14-15. On April 14, 2000, he reported minimal progress with the blocks and physical therapy, thus, Dr. Hubbell recommended trial spinal cord stimulation which was never performed; he testified he expected Claimant to have longer relief from the nerve blocks. *Id.* at 16, 18-20. Dr. Steiner testified he agreed a temporary stimulation may have been beneficial, if Claimant was psychologically sound. (EX 4, pp. 28-30).

Dr. Hubbell testified as Claimant's causalgia resolved he had continued residual pain radiating from his leg into his buttocks and back. (CX 8, pp. 20-21). He requested a MRI to determine if there was any disc injury which would explain the radiculopathy.

[13] Dr. Hubbell treated Claimant 13 times, including December 22, 1999, February 25, March 15, and 31, April 14, May 19, July 12, an August 11, 2000, March 15, and October 2, 2001, July 10, and August 16, 2002, and October 1, 2003.

Dr. Hubbell clarified Claimant's back pain had been present since his first examination, but it only became clear it was not caused by the causalgia after that condition resolved. He testified he believed Claimant had a degeneration in his lumbar spine or disk, which was aggravated by his work accident because Claimant's initial pain diagram was consistent with "either radicular pain due to nerve injury or facet pain radiating down the leg or causalgia pain radiating up the same nerve." *Id.* at 22, 25-27, 32-33, 52-53, 75. Dr. Steiner testified Claimant has an undiagnosed condition in his back unrelated to his on-the-job injury. He did not relate Claimant's back injury to his work accident because Claimant never complained of back pain to him; moreover, the leg pain would not radiate higher than the top of the leg and it is distinguishable from radicular pain, such as Dr. Hubbell suggested stemmed from Claimant's back. As Claimant had never complained of radicular pain, Dr. Steiner opined the back pain was not related to his accident. (EX 5, pp. 14-16, 25-26, 46-47).

Claimant's last visit with Dr. Steiner was June 22, 2000; the condition of his right leg remained essentially unchanged. Claimant complained of minimal tenderness in the midline of his back at L5; this was the first time Claimant complained of back pains to Dr. Steiner who found no objective indication Claimant had a lumbar injury. Dr. Steiner testified improper use of a cane does not cause back pains. (*Id.* at 21-24; EX 5, p. 11, 35-36).

Dr. Hubbell testified he stopped Claimant's physical therapy in March, 2001, because it was not providing relief; he placed Claimant on a trial stimulator between March, and October, 2001. He testified Claimant's only problem was back pain which caused spasms and resulted in his legs giving out. Dr. Hubbell stated Claimant became more active as his leg improved, resulting in increased spasm in his lower back, which he classified as a "classic presentation of facetogenic pain." (CX 8, pp. 45-47). Dr. Steiner did not agree with Dr. Hubbell's opinion Claimant's back spasms or delay in reporting back pains until November, 1999, were due to his becoming more active. (EX 5, pp. 13-14). Dr. Steiner maintained Claimant was active in July, 1999, when he returned to work and had no back spasms; his activity levels during the time Dr. Steiner treated him were such that any back injury would have surfaced. *Id.* at 13, 16-17, 19.

On October 2, 2001, Dr. Hubbell opined Claimant had facet pain syndrome in his back and again recommended a CT scan or MRI. He testified pain management specialists treat, evaluate and eliminate facetogenic pain in an effort to diagnose a pain problem for an orthopedic surgeon. (CX 8, pp. 34-36, 99; EX 13, p. 80). On August 16, 2002, Dr. Hubbell noted a physical examination of Claimant was consistent with facet pain syndrome but an MRI would be the best way to diagnose the condition. He noted the condition may have pre-existed the accident but was unsure if the accident was an aggravating cause, as he did not know the nature of the injury. He merely opined if Claimant twisted to free himself from the toolbox, he may have aggravated the facetogenic pain. However, Dr. Hubbell testified Claimant's back pain was more likely

than not related to his work injury as an exacerbation of the same, especially since Claimant complained of back pain in November 1998. (CX 8, pp. 87-88). Dr. Hubbell noted in his medical records that facetogenic pain may mimic radicular pain and can cause referred pain in the leg. He testified facetogenic pain is treated with pulsed mode radiofrequency.[14] (CX 8, pp. 56-57; EX 13, p. 84).

Dr. Steiner testified orthopedic surgeons address and diagnose facet pain syndrome and most do not misdiagnose or fail to diagnose the condition.[15] (EX 5, pp. 11-12, 24). He testified facet pain syndrome is arthritis of the facet joint which can be a pre-existing condition aggravated by trauma; however, the symptoms would appear within a few days of the trauma, not six months later. *Id.* at 20-21, 24-25, 39. Symptoms of facet pain syndrome include aching pain and stiffness which may radiate across the back or into the buttocks, may be more severe with extension or bending backwards and is more severe in the morning. Dr. Steiner testified none of these symptoms were present during the four months he treated Claimant following his accident. Additionally, Claimant never informed him he twisted, turned or maneuvered in such a way to free himself from the toolbox that he injured his back. *Id.* at 12-13, 23. Dr. Steiner stated facet pain syndrome is treated with anti-inflammatories, an exercise program and lumbar strengthening. He testified pulsed mode radio frequency is a controversial procedure that had not been shown to provide long-term relief for facet arthritis. *Id.* at 19.

In response to the opinion Claimant's back pain should have arisen within a few weeks of the trauma, Dr. Hubbell testified it is impossible for a person with severe pain in one location to identify other areas of pain; specifically, Claimant's severe leg pain prevented him from discerning the pain in his back. (CX 8, p. 31, 38). Dr. Steiner did not agree, testifying patients only articulate their pain and it is up to the doctor to accurately diagnose it. (EX 5, pp. 27-28). However, Dr. Hubbell stated doctors often focus their attention on the most severe pain; he did not think it was unreasonable everybody focused on Claimant's leg injury, given its severe nature. Dr. Hubbell then testified he believed that at the time Dr. Steiner treated Claimant, he did not suffer from a back injury; it only became apparent later on. Dr. Hubbell clarified Claimant's lumbar pain pattern has remained the same throughout his treatment, only changing in severity. (CX 8, pp. 39-41, 64, 73).

[14] Dr. Hubbell testified this involves placing a needle in the nerve branch for 8-12 months as a way to block the pain; for 95% of patients it is a permanent repair and they are released to full duty work, absent any other injuries. (CX 8, p. 58).

[15] Dr. Steiner testified he did not read Dr. Hubbell's deposition. He did read Dr. Hubbell's reports, but they did not affect his opinions. (EX 5, pp. 41-42).

Dr. Steiner re-examined Claimant on September 25, 2003, and opined he had reached maximum medical improvement (MMI) as of this date.[16] (EX 5, p. 8). He performed a musculoskeletal examination which revealed a limited range of motion in Claimant's back and testified Claimant had subjective complaints of back pain that had not been fully evaluated. He suggested diagnostic tests such as a CAT scan or MRI to further evaluate Claimant's back. *Id.* at 29-31. Dr. Hubbell testified Claimant reached MMI in his right leg on October 2, 2001, with no disability rating or work restrictions. (CX 8, p. 30-31). Dr. Steiner testified he agrees with Dr. Hubbell's opinion; however, he felt Claimant suffered a 10% impairment rating to his right leg, despite Dr. Hubbell's reluctance to assign an impairment rating. *Id.* at 8-10.

Dr. Hubbell released Claimant to do whatever does not cause him pain; he opined Claimant is at more than sedentary work because he performed janitorial duties and testified he is okay with the work Claimant is currently performing. He specified restrictions of lifting no more than 10 pounds away from the body or any repetitive lifting. Dr. Hubbell testified he would also restrict Claimant from swinging or twisting at the waist and prolonged sitting or standing, (CX 8, pp. 59-60, 96). Dr. Hubbell further testified if Claimant was found to have only facet pain syndrome, he may resume many lifting activities without re-injury; however, he would hesitate to release Claimant to full duty work with an MRI to rule out any other conditions. *Id.* at 60, 62-63. Dr. Hubbell testified Claimant's FCE would dramatically change after receiving facet treatment in that he may be released to heavy duty work, including his prior job at Employer; he did not believe Claimant's FCE would currently be valid. He testified Claimant can participate in light level work, with the possibility of crossing over to medium level with some activities. *Id*. at 90, 101-02.

(2) Deposition of Earl J. Rozas, M.D.

Dr. Rozas testified by deposition on August 13, 2003. He is a board certified orthopedic surgeon who no longer performs surgeries; the parties accepted him as an expert witness in his field. (EX 6, pp. 1, 6-7). Dr. Rozas first examined Claimant on October 25, 1999, to render a second opinion for injuries sustained at an on-the-job-accident June 28, 1999. Dr. Rozas understood Claimant was struck in the leg by a metal toolbox which resulted in a soft tissue injury to his right mid-calf area; he experienced numbness in the foot and leg, and pain in the leg. Dr. Rozas testified the only injury Claimant reported was his leg injury; however, Claimant drew a pain diagram indicating low back pain. (*Id.* at 7-10, 12, 34; EX 10, p. 12). He was informed that Claimant's

[16] Dr. Steiner testified he chose September 25, 2003, as the date of Claimant's MMI because he last examined Claimant in June 2000, and did not know what his condition was in the interim. (EX 5, p. 8).

EMG apparently indicated nerve damage; Claimant complained of swelling of his calf and used a walking cane daily. Dr. Rozas testified a bone scan performed August 27, 1999, revealed soft tissue injury secondary to trauma. Upon examination of Claimant, Dr. Rozas found a healed wound with tenderness in the mid-calf area. He testified Claimant had good strength of the ankles and calves, and only mild edema in the right ankle. (EX 6, pp. 10-12).

Dr. Rozas was provided with a copy of the EMG report and the accompanying interpretation which stated the findings were consistent with injury to the superficial and century nerves in the right leg, secondary to direct trauma. Dr. Rozas testified century nerves are small nerves that supply sensation changes including numbness, tingling, hot and cold, but they do not make muscles move. Conditions related to century nerve injuries include reflex sympathetic dystrophy or causalgia, which are essentially the same thing. Both cause an array of sensations and lead to swelling, warmth, changes in skin color and exquisite pain. (EX 6, pp. 13-15). Dr. Rozas testified causalgia usually resolves itself within a few months, but treatment may include ant-inflammatory and pain medications, steroids, physical therapy, and sympathetic nerve blocks. *Id.* at 16.

Dr. Rozas was provided with Dr. Hubbell's medical reports; he testified he agreed with Dr. Hubbell's diagnosis of causalgia and request for sympathetic nerve blocks and psychological treatment. At Dr. Rozas' second examination of Claimant on April 17, 2002, he noted there was no orthopedic or bony problem, his problem was purely neurological or a pain management issue. *Id.* at 16-17. Dr. Rozas could not say whether Claimant's condition worsened between October, 1999, and April, 2002, but he testified Claimant's complaints were consistent with causalgia. Dr. Rozas testified causalgia is a rare condition which can result in depression and anxiety, possibly causing the patient to perceive his condition to be worse than it actually is. *Id.* at 18-22. However, on cross-examination he testified causalgia has too many objective components for a person to be able to fake it. *Id.* at 34.

Dr. Rozas testified he has not had enough involvement with Claimant's care to be able to render an opinion as to whether Claimant is capable of working. However, Dr. Rozas did indicate a person with full-blown causalgia would have difficulty working a regular 40-hour per week job. He testified he would defer to the findings of an FCE as to what Claimant's work abilities were. Dr. Rozas stated FCEs are fairly accurate because they are completed over a series of sessions which would take into account a patient's good days and bad days. (EX 6, pp. 23, 25-27, 35). Dr. Rozas also testified he would not assign a disability rating to Claimant's leg because it is not strictly an orthopedic condition. *Id.* at 27.

Dr. Rozas testified Claimant originally complained of pain radiating from his right hip down his leg; he stated many people the hip and the back are one and the same. He testified the hip pain could be referred pain from the nerve damage in the leg, or an injury

in the lower back. However, he never diagnosed a lower back injury because it was not the primary injury or the primary focus of his second opinion. *Id.* at 29-30. Given that he did not see Claimant until four months after his accident, Dr. Rozas testified he would defer to Claimant's treating orthopedic surgeon as to the relationship between the accident and his leg and back injuries. *Id.* at 31. However, on cross-examination Dr. Rozas testified there is nothing inconsistent with a twisting motion to the leg causing a stressful injury to the back. He deferred to Dr. Hubbell as to whether Claimant's twisting mechanism aggravated a pre-existing back condition. Additionally, Dr. Rozas testified when people suffer multiple injuries their brain prioritizes the pain and as one injury subsides another may become more prominent. He is of the opinion this happened to Claimant. *Id.* at 32-33. Dr. Rozas testified that not being a board certified orthopedic surgeon does not preclude one from being able to accurately diagnose the mechanism of a back injury; additionally, he stated Dr. Hubbell is unusually sharp and treats back injuries probably more than any other body part. *Id.* at 36-37.

(3) Deposition of John McCain, M.D.

Dr. McCain testified by deposition on October 23, 2003. He is board certified in physical medicine and rehabilitation and pursued a subspecialty in pain, with two years of experience in anesthesia; the parties accepted him as an expert witness in the field of physical medicine and rehabilitation. Dr. McCain examined Claimant on October 4, 2000, and May 30, 2001, as an IME at the request of the claims adjuster. (EX 7, pp. 1, 6-9). He was requested to examine Claimant with regard to his leg injury and the spinal cord stimulator intended to help with his leg pain. Claimant originally presented with complaints of constant pain in the right leg which he described as numbness, burning and sharp in nature. It was worse with prolonged standing but was better with rest. Claimant also had secondary complaints of back pain which began after his physical therapy. Claimant's back pain worsened with slight bending forward; it was a sharp burning pain centered in his lower back. The intensity of Claimant's back pain correlated well with the right leg. *Id.* at 7-10.

Dr. McCain initially diagnosed Claimant with a post traumatic right leg soft tissue injury, possible resolving complex pain syndrome, or causalgia, and an undetermined low back pain. *Id.* at 10-11, 14. He performed a full scale lumbar exam on October 4, 2000; the results were normal and the only basis for Claimant's back pain was his subjective complaints. Dr. McCain testified Claimant had no objective findings to substantiate a herniated, bulging or ruptured disc, or facet pain. Dr. McCain testified he did not know the date Claimant's back pain began. *Id.* at 11-12, 16-18. However, since Claimant related the back pain to his physical therapy and in light of the nature of the information provided, Dr. McCain assumed the back injury was not related to the work accident. *Id.* at 13.

Dr. McCain testified he encountered facet pain syndrome on a daily basis in his practice. While orthopedic surgeons can suspect facet pain syndrome, diagnosing it through radiologic imaging is correct only 15-40% of the time. The only way to accurately diagnose it is by fluoroscopic injection of anesthetic into the joint; whether the pain is from the facet joint will depend on if patient experiences relief and for how long. However, he also stated that based on a physical examination, orthopedic surgeons are qualified to determine whether there is a lumbar problem. On cross-examination, Dr. McCain stated he did not have any information as to whether these injections were provided to Claimant; his conclusions are based only on his physical examination. (EX 7, pp. 18, 31-35, 72). Dr. McCain defined facet pain as flexion and hyperextension of the facet joints when struck sufficiently to cause the injury, the most common facet pain syndrome occurs in the neck secondary to whiplash. Within 24 hours the person would experience increasing stiffness and pain. He explained referred pain from the facet joints in the back can cause buttock pain and posterior thigh pain, though it usually does not extend past the knee. Radicular pain, however, is purely disc related and is more specific in its location. (EX 7, pp. 18-20). Dr. McCain testified he would expect to see this pain within 72 hours after a traumatic injury; it would be difficult to relate the pain to an accident which occurred 6 months prior. Even if Claimant had multiple injuries, Dr. McCain would still expect some back pain to be present during the first five months of treatment. *Id.* at 21, 71. Dr. McCain stated radiofrequency obliteration is a standard practice in the treatment of facetogenic pain; however, the success of this treatment would depend on the patient's age, nutrition and damage to the nerve. The relief could last for months, but there is a 50-50 chance of success where relief would last for years. Additional treatments include physical therapy or exercise focusing on flexion, medications or periodic facet injections. Aside from trauma, facetogenic pain can be age-related or caused by repetitive physical motions. *Id.* at 60-61, 64-65.

Additionally, Dr. McCain testified he has seen patients who have multiple sources of pain, which come to life at different times; however, he would expect Claimant's back to become bothersome during the six months he treated with Dr. Steiner. Dr. McCain testified Claimant could be exhibiting signs of symptom magnification; however he does not believe Claimant is malingering. He testified Dr. Steiner would be in the best position to determine the cause of Claimant's injuries because he was the first physician to treat Claimant. *Id.* at 39-40, 67, 69.

Dr. McCain re-examined Claimant on May 30, 2001. He did a short examination of Claimant's right leg, finding full range of motion and no neurological deficits. He did not agree with Dr. Hubbell's recommendation for a spinal cord stimulator because Claimant was able to control his pain with Advil and did not have any objective findings upon physical examination. *Id.* at 22-23. He reported Claimant had reached MMI by this second visit, although Dr. McCain testified he was probably at MMI as of October 4, 2000. *Id.* at 24-25.

Dr. McCain reported no objective findings of a back injury on May 30, 2001; Claimant did not have any problems with sitting, standing, or bending forward or backward, thus he did not diagnose any discogenic or facet joint pain. However, on cross-examination he testified spring testing at Claimant's lower lumbar region yielded moderate pain, indicating something could possibly be wrong. Dr. McCain explained facet joint pain would not extend down the entire lower extremity to the foot and he has never seen facet joint pain extend below mid-calf; Claimant told him his entire leg was involved. Additionally, Dr. McCain stated referred pain from a leg injury could extend up into the thigh, but usually remains local to the injury site. *Id.* at 26-28, 49. Complex regional pain syndrome could cause further reaching pain, but Claimant did not have any evidence of this. Dr. McCain hesitated to relate Claimant's back pain to his work accident when the first complaints of such pain surfaced five months after the accident occurred. He testified he would relate the back pain to the events which occurred during the onset of the pain, in Claimant's case he would relate it to the physical therapy. *Id.* at 29, 42-44.

Dr. McCain did not believe Claimant was disabled from working at the shipyard at the time of his October 4, 2000 examination. Similarly, he felt Claimant could return to work as of May 30, 2001. However, on cross-examination he testified he was never provided a description of Claimant's job with Employer, and he deferred to a FCE for Claimant's work abilities. *Id.* at 11, 25, 62-63. Dr. McCain testified he would only restrict Claimant from working with heights, given his leg injury. Giving Claimant the benefit of the doubt, Dr. McCain would also restrict him from any job which did not allow a change in position every 30 minutes. *Id.* at 25, 61. He approved all the jobs provided him on October 10, 2001, by Dr. Stokes. *Id.* at 44.

(4) Emergency Room Records

Claimant visited various hospital emergency room and urgent care centers for medication and treatment of his leg and back injuries. Notably, he was admitted to The Family Doctors facility on November 8, 1998, six months prior to his accident, for complaints of low back pain. (EX 14, p. 7). Immediately following his injury, Claimant treated at the Ochsner Clinic Foundation on June 29, 1999, and was diagnosed with a laceration to his right leg. On July 6, 1999, he was released to regular duty and on July 8, 1999, he was restricted to sedentary duty. On July 15 Ochnser released him to regular duty as his leg laceration had resolved. (EX 16, pp. 20-37). Claimant treated at The Family Doctors facility again on July 21, 1999, and was released to regular duty work. (EX 14, p. 2).

On August 25, 1999, Claimant treated at the LSU Health Sciences Center with complaints of right lower leg pain and edema. He returned on November 30, 1999, and informed the attending physician he underwent physical therapy for a leg injury and now experienced low back pain. He was diagnosed with herniation and low back pain. On

January 11, 2000, he returned to LSU with leg pain radiating to his toes. (EX 18, pp. 7, 9, 12). Claimant was next admitted to the Ochsner Clinic Foundation on July 1, 2000, with complaints of right sacral pain radiating into his right leg; an examination revealed tenderness over the sciatic nerve and he was diagnosed with sciatica. (EX 16, p. 64).

Claimant was admitted again to Ochsner Clinic Foundation on June 16, 2001, with complaints of burning and stabbing pain in his right lumbosacral back radiating into his leg. He also reported numbness and tingling in his leg. The attending physician diagnosed Claimant with back pain and sciatica; x-rays revealed minor degenerative change in the low back. (EX 16, pp. 54-55, 60). On September 21, 2001, Claimant returned to Ochsner with pain in his left sacral radiating down his leg. He told the physician he had an injury to his back which resulted in a pinched nerve and chronic back pain for two years. He reported pain radiating down both legs, but no numbness or tingling. Claimant was diagnosed with chronic back pain and sciatica. *Id.* at 47-49, 129.

(5) Vocational Rehabilitation Records

Claimant underwent a functional capacity evaluation at Crescent City Physical Therapy on January 17 and 19, 2000. He performed at maximum effort and did not exhibit signs of symptom magnification. Claimant was capable of performing frequent forward bending in the standing position. He could perform occasional standing, stair climbing and repetitive squatting and was limited to rare ladder climbing. The results indicated Claimant was functional at the light to medium level. (EX 15, p. 4).

(6) Deposition and Records of Larry Stokes, M.D.

Dr. Stokes has been a vocational rehabilitation counselor for 21 years, having been licensed as such in 1988. He testified by deposition on October 17, 2003, and was accepted by the parties as an expert in his field. (EX 8, pp. 1, 5-7). F.A. Richard and Associates requested Dr. Stokes to review Claimant's medical records and conduct a vocational analysis and labor market survey to determine Claimant's wage earning potential; Dr. Stokes issued his initial report on September 21, 2001. *Id.* at 8-9. At this time, Dr. Stokes found Claimant to be a 32 year-old man with an 11th grade education living in Marrero, Louisiana. He went to Jefferson Technical Vocational School and became a certified welder. His work history included jobs as a cook, dishwasher, fast food worker, welder helper and tack welder, earning $9.53 per hour at the time of his accident. On cross-examination, Dr. Stokes testified he believed the tack welder position to be of heavy physical demand. Dr. Stokes was also aware Claimant was training to become a barber, but he did not know if Claimant completed the training. *Id.* at 10, 18, 86.

Dr. Stokes testified he understood Claimant was injured on June 28, 1999, and attempted to return to work in July; he was released to regular duty work on July 21,

1999. Dr. Stokes testified Dr. Steiner released Claimant to light duty with no prolonged standing or walking in June 2000, and on July 12, 2000, Dr. Hubbell indicated Claimant could not return to a 40 hour per week job with excess standing. Dr. McCain restricted Claimant from heights, lifting or bending on uneven surfaces. Dr. Stokes stated the FCE indicated Claimant was functional at the light to medium level. (EX 8, pp. 12-13). Dr. Stokes understood Claimant to have reached MMI as of June 28, 2001, at the latest. Id. at 15.

Dr. Stokes conducted his vocational analysis based on Claimant's age, education, work experience, training, skills and physical capacity. He testified Claimant may be able to return to work as a tack welder, if not at heights. Id. at 16. Dr. Stokes identified nine jobs in the light to medium category which were suitable for and generally readily available to Claimant. He listed the number of average openings for each (between 20 and 1,030 per year) and the average weekly wage (between $233.60 and $450.80). He explained the wages came from the Louisiana Department of Labor Statistics and were representative of wages available in the New Orleans area; due to the dynamics of the labor market in New Orleans, Dr. Stokes testified it would be impossible to call every employer to find out if they had an opening at that moment. (EX 21, p. 7; EX 8, p. 32). Dr. Stokes also identified 6 specific positions which were available and suitable for Claimant. The employers listed were actually hiring in September 2001. (EX 8, p. 33). They are as follows:

Position	**Employer**	**Requirements**	**Pay**
Deli Attendant	Radisson Hotel	Light duty, alternate sitting, standing and walking, occasional stooping, bending and max lifting 20 pounds	$5.75-6.25 per hour
Dishwasher	Palace Truck Stop	Light duty, alternate sitting, standing and walking, maximum lifting 15 pounds	$5.75-6.31 per hour
Line Cook	New Orleans Restaurant	Light position, alternate sitting, standing, walking, occasional bending, max lifting 5 pounds	$6.00-6.50 per hour
Delivery driver	Rocky's Pizza	Light position, max lifting 15 pounds	$6.00 per hour plus tips
Pizza Maker	Rocky's Pizza	Light position	$6.00-7.50 per hour
Deli worker/cashier	Danny & Clyde's	Preparing food and cleaning work area; mostly standing with alternate sitting and occasional stooping.	$6.00-7.00 per hour

Stokes testified his further research at Rocky's indicated employees earned $30-$40 per day in tips, up to $60-$80 on good days. Based on these 6 jobs, Dr. Stokes calculated the

average weekly wage Claimant could earn post-injury was $6.00-$6.75, or $240-$270 per week, not including the tips at Rocky's Pizza. (EX 8, pp. 23-26, 31; EX 21, pp. 9-10). Dr. Stokes testified he provided this list of employers, with their contact information, to Claimant on September 27, 2001. (EX 8, p. 36). Additionally, Dr. Stokes found a barber in the New Orleans area earned an average of $351.60 per week during this time period; he clarified this figure was based on reported wages, which he understood to be net earnings after the cost of supplies and booth rental, not gross earnings. *Id.* at 62, 135-36. Dr. Stokes testified he presented a profile of Claimant to the above listed employers, pursuant to *Turner,* and based on the profile Claimant was invited to apply at the Palace Truck Stop, (EX 8, pp. 97-98). He also stated the physical demand classifications were assigned by himself based on the job description, not by the employers. Dr. Stokes based his opinion on information provided by the employers, but did not go to the individual job sites and conduct an analysis on their actual physical requirements. Although some employers conducted criminal background checks, Dr. Stokes could not testify as to the particulars employers look for. *Id.* at 101, 103, 107-08.

Dr. Stokes completed an updated vocational report on October 10, 2003. As he had not received any updated medical records since his first assessment, Dr. Stokes met with Claimant on September 23, 2003 and reviewed his deposition of July 9, 2003. He found Claimant had finished barber school and was trained in ship fitting as well as welding. (EX 8, pp. 38-39, 43; EX 21, pp. 58-59). Dr. Stokes was informed Claimant had worked as a barber and a janitor. He testified the average wages for these jobs in the New Orleans area were $361.20 per week for a barber (the average of $251.21 and $441.60) and $295.60 for janitors (average of $240.80 to $323.60).[17] (EX 8, pp. 50-51). Dr. Stokes also re-contacted the employers in his initial job search and contacted new employers, as well. Three of the positions from the first job search; the deli worker/cashier, line cook and dishwasher; were still available. In addition, Dr. Stokes found new jobs as a delivery driver for Take-out Taxi, at $8.00-$12.00 per hour; a barber at Diamond Cuts, averaging $9.03 per hour; and a cashier at a self service gas station, averaging $6.64 per hour. He concluded Claimant was again employable at a rate of $245.20-$400.00 per week. *Id.* at 52-53. Dr. Stokes mailed Claimant this updated job information on September 27, 2003, but did not follow-up to see if Claimant actually received the letter. *Id.* at 120.

Subsequent to this second report, Dr. Stokes received various medical records including the records and deposition of Dr. Hubbell outlining Claimant's medical condition and physical restrictions; however, he testified he did not know if these records

[17] Dr. Stokes received this wage data from the Louisiana Department of Labor; he found government reports more reliable an accurate than his calling various barbers or janitors in the area. However, he also confirms the government data by contacting workers in the field. (EX 8, p. 51).

were complete.[18] Nothing in the records changed his opinion in his vocational analysis. (EX 8, pp. 39-42). Dr. Stokes testified he did not read Dr. Rozas' deposition; however, assuming Dr. Rozas testified Claimant was unable to work for a period of time might affect Dr. Stokes' opinion Claimant has been employable since 2001. All of the positions he identified were within the restrictions given by Dr. Hubbell. Dr. Stokes testified Claimant had a good prognosis for returning to work subsequent to a diligent job search, but suggested he contact the U.S. Department of Labor Rehabilitation Program if he needed assistance. *Id.* at 43, 54, 56, 77-78.

Dr. Stokes testified Claimant did not inform him he could not work full time; he understood Claimant worked as a janitor part time because that was what the contract was for. The medical evidence did not suggest to Dr. Stokes that Claimant was only capable of part time work. (EX 8, pp. 57-58). Additionally, Dr. Stokes testified he did not know why Claimant did not seek full-time work; Claimant only stated he could not open his own barber shop because he did not have the money; he never informed Dr. Stokes that his physical restrictions kept him from working. Claimant quit Lisha's because she brought in another barber, reducing Claimant's earnings, and he left Keenan's Deluxe Styles because there was insufficient parking for his customers which impacted his income. Dr. Stokes found the barber position to be a light duty job according to the Department of Labor definition, and Claimant informed him he used a stool to cut hair and was able to alternately stand and sit. However, on cross-examination Dr. Stokes testified regarding the position at Diamond Cuts, Claimant would be required to rent booth space. *Id.* at 58-61, 128-31.

Dr. Stokes testified Claimant spent time in jail more than ten years ago on a felony conviction. He did not have the particulars on how this would affect Claimant's job search. Similarly, Dr. Stokes could only speculate that garnishment of wages for back child support may be a deterrent for hiring someone. (EX 8, pp. 64-66).

(7) Wage Records

The wage records submitted by Employer and Claimant indicate Claimant worked at Employer and at Southport in the year prior to his accident. Specifically, Claimant worked at Southport from approximately August 17 through November 8, 1998, and earned a total of $8,495.25 in regular wages and $2,116.17 in overtime pay. He started at a rate of $7.07 per hour, but by the time he left Southport he earned $8.00 per hour. (See CX 5, pp. 6-12). Claimant received his first paycheck from Employer on December 31, 1998. Between that date and June 4, 1999, he earned a total of $4,931.19 at a rate of $9.18 per hour. *Id.* at 23-29. While the records indicate Claimant was paid on a weekly

[18] Dr. Stokes received medical records from Crescent City Physical Therapy, The Family Doctors, Dr. McCain, Bone and Joint Clinic, Medical Center of Louisiana, West Jefferson Medical Center, Ochsner Foundation Hospital, Dr. Rozas, Dr. Hubbell. (EX 8, pp. 75-76).

basis, the checks only provide the number of hours he worked, not the number of days. Additionally, there is no evidence of Claimant's employment between June 28, 1998 and August 23, 1998, or after June 4, 1999. (See CX 5).

IV. DISCUSSION

A. Contentions of the Parties

Claimant contends he is entitled to temporary total disability benefits. He maintains he is entitled to the Section 20(a) presumption because Dr. McCain and Dr. Steiner diagnosed him with undetermined back pain, which Dr. Hubbell found to be facetogenic pain syndrome and related to his work accident. Dr. Hubbell, Claimant and Mrs. Washington all testified the back pains began as Claimant became more active and underwent physical therapy in the fall of 1999. Additionally, Dr. McCain testified he would relate the back injury to Claimant's physical therapy. Despite the lack of confirmed etiology of his back condition, Claimant contends it was either directly caused or aggravated by his work accident. He asserts his back is not yet at MMI, as the doctors all agree he needs continuing treatments for his back. Furthermore, Claimant contends it is undisputed he cannot return to Longshore work, and Employer has failed to establish suitable alternative employment because they did not prove how the jobs are available or within Claimant's physical restrictions. Alternatively, Claimant contends he diligently, yet unsuccessfully, sought work as a barber and janitor; at a minimum he should be found to have a wage earning capacity of only $130 per week. Finally, Claimant argues his emergency room visits were for back pain which was not authorized by Employer and were necessary to his treatment and recovery. As such, they are compensable medical expenses. Claimant also contends his average weekly wage should be calculated pursuant to § 910(c) because his wage records are unavailable, and he is entitled to the minimum compensation rate.

Employer contends Claimant is only entitled to scheduled disability compensation for his leg injury, as stipulated. The Section 20(a) presumption, Employer argues, does not apply to Claimant's back injury because there is no evidence linking it to his workplace accident; furthermore, Claimant is an incredible witness whose testimony should not be relied upon. Employer argues Claimant did not complain of back pain until six months after his accident; even though Claimant testified his back pain began a few weeks following the accident he still did not complain to his treating physician at that time. If the presumption does apply, Employer contends it has rebutted it through the records and testimony of Drs. Steiner, Rozas and McCain who did not relate the back injury to the work accident. Alternatively, Employer contends it has established suitable alternative employment, based on the jobs indentified by Dr. Stokes. Employer argues Claimant would not suffer a loss of wage earning capacity, and he did not diligently

pursue these employment opportunities. Employer asserts Claimant is only entitled to the minimum compensation rates, based on his earnings with Employer the 52 weeks before the accident. Finally, Employer asserts it is not responsible for the additional medical expenses set forth in CX 7, as there is no description of the nature of the services rendered, reason for such services, whether authorization was requested and if it was then denied. Additionally, Employer argues it is not liable for Claimant's emergency room visits which took place while he was already authorized to see Dr. Steiner, Dr. Rozas or Dr. Hubbell.

B. Causation

In establishing a causal connection between the injury and claimant's work, the Act should be liberally applied in favor of the injured worker in accordance with its remedial purpose. *Staffex Staffing v. Director, OWCP*, 237 F.3d 404, 406 (5th Cir. 2000), *on reh'g*, 237 F.3d 409 (5th Cir. 2000); *Morehead Marine Services, Inc. v. Washnock*, 135 F.3d 366, 371 (6th Cir. 1998); *Wright v. Connolly-Pacific Co.*, 25 BRBS 161, 168 (1991). By express statute, the Act presumes a claim comes within the provisions of the Act in the absence of substantial evidence to the contrary. 33 U.S.C. § 920(a). Should the employer carry its burden of production and present substantial evidence to the contrary, the claimant maintains the ultimate burden of persuasion by a preponderance of the evidence. 5 U.S.C. 556(d); *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281 (1994).

In the present case, the parties stipulated Claimant's leg injury was a result of his June 28, 1999 workplace accident. Therefore, the issue of causation only pertains to his back injury.

(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case

Section 2(2) of the Act defines "injury" as "accidental injury or death arising out of or in the course of employment." 33 U.S.C. § 902(2). The Act provides a presumption that aids the claimant in establishing that a harm constitutes a compensable injury:

> In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary…
>
> (a) That the claim comes within the provisions of this chapter.

33 U.S.C. § 920(a).

To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm but has the burden of

establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused, aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury arose out of employment. *Hunter*, 227 F.3d at 287. However, "the mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608 (1982); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19 (1990). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983)(claimant must allege an injury arising out of and in the course and scope of employment).

(1)(a) Existence of Physical Harm or Pain

To show harm or injury a claimant must show that something has gone wrong with the human frame. *Crawford v. Director, OWCP*, 932 F.2d 152, 154 (2nd Cir. 1991); *Wheatley v. Adler*, 407 F.2d 307, 311-12 (D.C.Cir. 1968); *Southern Stevedoring Corp. v. Henderson*, 175 F.2d. 863, 866 (5th Cir. 1949). Under the aggravation rule, an entire disability is compensable if a work related injury aggravates, accelerates, or combines with a pre-existing condition. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1069 (5th Cir. 1998)(pre-existing heart disease); *Kubin v. Pro-Football, Inc.*, 29 BRBS 117, 119 (1995)(pre-existing back injuries).

In the present case, Claimant reported back pain on multiple occasions, beginning with a pain diagram he drew on October 25, 1999, for Dr. Rozas. Since then, he has continually complained of low back pain to emergency room doctors, Dr. Hubbell, Dr. Rozas and Dr. McCain. He reported this pain to Dr. Steiner on June 22, 2000. These doctors agreed Claimant had some type of back injury, although the precise etiology was undetermined. Dr. Hubbell opined it was facet pain syndrome, and Dr. McCain and Dr. Steiner both requested an MRI to further determine the source of Claimant's back pain. As such, I find the evidence indicates Claimant indeed suffered an undetermined low back injury, and thus satisfied the first prong of the Section 20(a) presumption.

(1)(b) Establishing that an Accident Occurred in the Course of Employment, or that Conditions Existed at Work, Which Could Have Caused the Harm or Pain

An injury cannot be found absent some work-related accident, exposure, event or episode. *Adkins v. Safeway Stores, Inc.*, 6 BRBS 513, 517 (1978). Although a claimant is not required to introduce affirmative medical evidence establishing that working conditions caused the harm, a claimant must show the existence of working conditions that could conceivably cause the harm alleged beyond a "mere fancy or wisp of 'what

might have been.'" *Wheatley*, 407 F.2d at 313. A claimant's uncontradicted credible testimony alone may constitute sufficient proof of physical injury. *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144 (1990)(finding a causal link despite the lack of medical evidence based on the claimant's reports); *Golden v. Eller & Co.*, 8 BRBS 846, 849 (1978), *aff'd*, 620 F.2d 71 (5th Cir. 1980)(same). On the other hand, uncorroborated testimony by a discredited witness is insufficient to establish the second element of a *prima facie* case that the injury occurred in the course and scope of employment, or conditions existed at work which could have caused the harm. *Bonin v. Thames Valley Steel Corp.*, 173 F.3d 843 (2nd Cir. 1999)(unpub.)(upholding ALJ ruling that the claimant did not produce credible evidence a condition existed at work which could have cause his depression); *Alley v. Julius Garfinckel & Co.*, 3 BRBS 212, 214-15 (1976)(finding the claimant's uncorroborated testimony on causation not worthy of belief).

In the present case, Claimant suffered an injury at work on June 28, 1999. He had previously complained of low back pain to his doctor in November 1998. Dr. Hubbell, Claimant's treating physician, related the back pain to Claimant's work injury. Specifically, Dr. Hubbell opined Claimant's back pain was masked by his leg pain and only came to light as he became more active in the fall of 1999. Later in his treatment of Claimant, Dr. Hubbell opined if Claimant twisted at the waist during the accident, he may have injured or aggravated a pre-existing injury in his lower back. Contrary to Employer's contention, I do not find Claimant's testimony to be entirely incredible. However, I do not credit his September 20, 2002 affidavit, stating he twisted during the accident, as it is self-serving and only follows Dr. Hubbell's opinion a twisting motion could have resulted in a back injury. Notwithstanding, Dr. Hubbell maintained the back pain was related to the work injury; he opined Claimant suffered from facetogenic pain syndrome, although diagnostic testing was needed to confirm this particular etiology.

Dr. Rozas testified he would defer to Dr. Hubbell as to whether Claimant's twisting aggravated a back condition; he also agreed with Dr. Hubbell that Claimant prioritized his pain and focused on the leg first, despite having injured his back. Dr. McCain testified he would relate the back pain to Claimant's physical therapy sessions in the summer and fall of 1999. As the physical therapy was a result of the accident, it follows that any injury resulting there from is also a result of the accident.

In light of the medical opinions of Dr. Hubbell, Dr. Rozas and Dr. McCain, I find Claimant has established his back injury could have been caused by his June 28, 1999 work accident sufficient to invoke the Section 20(a) presumption.

(2) Rebuttal of the Presumption

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). To

rebut the presumption of causation, the employer is required to present *substantial evidence* that the injury was not caused by the employment. *Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986). The Fifth Circuit described *substantial evidence* as a minimal requirement; it is "more than a modicum but less than a preponderance." *Ortco Contractors, Inc. v. Charpentier*, 332 F.3d 283, 290 (5th Cir. 2003) *cert. denied* 124 S.Ct. 825 (Dec. 1, 2003). The court went on to state an employer does not have to rule out the possibility the injury is work-related, nor does it have to present evidence unequivocally or affirmatively stating an injury is not work-related. "To place a higher standard on the employer is contrary to statute and case law." *Id.* at 289-90 (*citing Conoco,* 194 F.3d at 690); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983)(the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995)("unequivocal testimony of a physician no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

Dr. Steiner testified Claimant's back injury was not related to his June 28, 1999 work accident. Dr. Steiner began treating Claimant one month after the accident, at which time Claimant voiced no complaints of back pain. He testified Claimant's activity levels during this time were such that any back injury would have become apparent. Also, Claimant did not report he twisted at the waist during the accident in such a way as to result in a back injury. Additionally, he testified Claimant's leg pain would not have masked his back pain, because it is up to the physician to render a diagnosis. Based on the lack of temporal relationship between Claimant's accident and his complaints of back pain, Dr. Steiner testified it was more likely than not that the two were not related. Dr. McCain agreed with this, testifying any complaints of back pain arising from the work accident should have been voiced within weeks, and certainly within 5 months, of said accident.

Additionally, on June 22, 2000, Dr. Steiner found no objective evidence of Claimant's back pain. Similarly, Dr. McCain performed a full examination of Claimant's lumbar on October 4, 2000 and May 30, 2001, and found no objective evidence of a herniated or bulging disc, or facet pain. He testified the only evidence of a back injury was Claimant's subjective complaints. Dr. McCain testified if Claimant injured his back in his June 1999 accident, he would expect to see pain within 72 hours of the injury. He stated Dr. Steiner would be in the best position to determine the cause of Claimant's injuries, because he was the first physician to treat Claimant. Dr. Steiner, Dr. McCain and the physical therapist noted Claimant exhibited signs of symptom magnification, further strengthening Employer's argument that the back injury was unrelated to the accident. As such, I find Employer has presented sufficiently substantial evidence to rebut Claimant's Section 20(a) presumption.

(3) Causation on the Basis of the Record as a Whole

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87 (1935); *Port Cooper/T Smith Stevedoring Co.*, 227 F.3d at 288; *Holmes*, 29 BRBS at 20. In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Greenwich Collieries*, 512 U.S. at 281.

Here, I find the record as a whole weighs in Claimant's favor. Claimant reported low back pain to the emergency room physician in November of 1998. However, he was deemed healthy in Employer's pre-employment physical, indicating he did not have on-going low back problems. Only after his June 28, 1999 work accident occurred did Claimant begin to complain of low back pain. I find the first complaint was reported on October 25, 1999, in a pain diagram drawn for Dr. Rozas. Although no back pain was diagnosed, this diagram is consistent with the testimony of Claimant, Mrs. Washington and Dr. Hubbell that the back pain began when Claimant became more active and participated in physical therapy in the fall of 1999. Dr. McCain related Claimant's back pain to his physical therapy. Because the physical therapy was connected to his accident, it is reasonable to assume any pain arising from the physical therapy was also connected to his accident. These physical therapy records were not submitted into evidence, thus I am unable to ascertain whether Claimant complained of back pain to his physical therapist. Nonetheless, as there was no evidence of an intervening injury, I find it is reasonable to relate the back pains to Claimant's work accident. Moreover, Dr. Hubbell and Dr. Rozas both testified Claimant may have prioritized his leg pain over his back pains immediately following his injury; this is corroborated by Dr. McCain's testimony he would expect any back injury to surface within 5 months of the accident. Indeed, Claimant's first complaint of back pain on October 25, 1999, was 4 months after his accident.

Dr. Steiner repeatedly testified Claimant's back pains were not related to his work accident, primarily because his complaints did not surface until 6 months afterwards. Additionally, Dr. Steiner testified as Claimant's primary treating physician, he would have been the first to notice any back injury. Dr. Steiner testified if Claimant accurately reported pain, he would have been able to accurately diagnose a back injury. However, if Claimant was prioritizing his leg pain, he may not have noticed his own back pain. Dr. Steiner also testified Claimant was active throughout his treatment; specifically, he returned to work in July 1999 without any complaint of back pain. However, I note Claimant only returned to full duty work for a few days. Moreover, Dr. Steiner did not begin treating Claimant until July 30, 1999, after Claimant unsuccessfully returned to work and two weeks after he went on workers' compensation.

Dr. Steiner and Dr. McCain both found no objective evidence of Claimant's back pains on June 22, 2000, October 4, 2000, and May 30, 2001. However, Dr. McCain admitted Claimant's lower back exhibited moderate pain in a spring test on May 30, 2001. Additionally, on July 1, 2000, June 16 and September 21, 2001, Claimant was diagnosed with sciatica and back pain at Ochsner Clinic foundation. Dr. Hubbell testified Claimant exhibited objective findings of facetogenic pain on October 2, 2001.

Although the precise etiology of Claimant's back pain is essentially unproven, it is clear he suffers some sort of back pain which is related to his June 1999 work accident. Dr. Steiner is the only physician who unequivocally asserts there was no evidence of a relationship between the accident and back injury. While Dr. McCain hesitated to relate the pain to the June 1999 accident, he did relate it to Claimant's physical therapy which was a result of that accident. Dr. Hubbell was persistent in his testimony relating the back pain to the accident and Dr. Rozas deferred to his opinion regarding the causation of Claimant's back pain. In light of the foregoing, I find the totality of the evidence weighs in favor of Claimant sufficiently to establish causation between his back injury and work accident. As such, Claimant is entitled to disability benefits under the Act.

C. Nature and Extent

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2003). Disability is an economic concept based upon a medical foundation distinguished by either its nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989); *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168, 23 BRBS (CRT)(2d Cir. 1990); *Sinclair v. United Food & Commercial Workers*, 13 BRBS 148 (1989). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

Here, Dr. Steiner and Dr. Hubbell agree Claimant's leg injury has completely resolved as of October 2, 2001. Although Dr. Steiner opined Claimant had reached MMI as of September 25, 2003, he explained this was because he had not been kept abreast of Claimant's condition since June 22, 2000, and had no reason to disagree with Dr. Hubbell's opinion MMI was achieved on October 2, 2001. Dr. McCain testified he thought Claimant's leg injury reached MMI as of May 31, 2001, and possibly even as early as October 4, 2000. However, I place more weight on the opinions of Dr. Steiner and Dr. Hubbell, as they were Claimant's treating physicians and Dr. McCain only examined him on two occasions. As such, I find Claimant's leg reached MMI on October 2, 2001.

Claimant's back, however, is not yet at MMI. As indicated in the emergency room reports and Dr. Hubbell's medical records, Claimant continues to experience low back pains. Dr. Steiner testified after his September, 2003, examination of Claimant he was of the opinion Claimant had back pains that were not fully evaluated. Dr. Hubbell requested, and Dr. Steiner agreed, an MRI of Claimant's back to determine the etiology of the pain. Dr. Hubbell also testified if Claimant suffers facetogenic pain, the proper treatments may result in 100% recovery and his ability to return to work. This suggests Claimant's condition has not reached a plateau. As such, I find his back continues to be injured and is not yet at MMI.

Case law has held that to establish a *prima facie* case of total disability under the Act, a claimant must prove he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, OWCP*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986).

In the present case, the only doctor who opined Claimant may be able to return to his job at Employer was Dr. McCain. However, he admitted he did have access to Claimant's FCE or know what his work restrictions were; he testified he would defer to the FCE. Claimant's FCE indicated he was functional at the light-medium category. Both Dr. Steiner and Dr. Hubbell, Claimant's treating physicians, agreed this was an accurate assessment and released him to light-medium duty work. Claimant's job at Employer was heavy duty work. As such, I find Claimant is unable to return to his former job and has established a *prima facie* case of total disability.

D. Suitable Alternative Employment

Once the *prima facie* case of total disability is established, the burden shifts to the employer to establish the availability of suitable alternative employment. *Turner*, 661 F.2d at 1038; *P&M Crane*, 930 F.2d at 430; *Clophus v. Amoco Prod. Co.*, 21 BRBS 261, 265 (1988). To establish suitable alternative employment, an employer must prove the availability of actual employment opportunities within Claimant's geographical location which he could perform considering his age, education, work experience and physical restriction. *Turner*, 661 F.2d at 1042-43; *Edwards v. Director, OWCP,* 99 F.2d 1374 (9th Cir. 1993); *cert. denied* 511 U.S. 1031 (1994). The finder of fact may rely on the testimony of a vocational expert in determining the existence of suitable alternative employment, even if the expert did not examine the claimant, as long as the expert is aware of the claimant's age, education, work experience and physical restrictions. *Hogan v. Schiavone Terminal*, 23 BRBS 290 (1990); *Southern v. Farmers Export Co.*, 17 BRBS 64, 66-67 (1985).

An employer may establish suitable alternative employment retroactively to the day when the claimant was able to return to work. *New Port News Shipbuilding & Dry Dock Co.*, 841 F.2d 540, 542-43 (4th Cir. 1988); *Bryant v. Carolina Shipping Co., Inc.*, 25 BRBS 294, 296 (1992). Where a claimant seeks benefits for total disability and suitable alternative employment has been established, the earnings established constitute the claimant's wage earning capacity. *See Berkstresser v. Washington Metro. Area Transit Auth.*, 16 BRBS 231, 233 (1984). When an employer presents several different jobs that are available to a claimant it is appropriate to average the earnings to arrive at a fair and reasonable estimate of the claimant's earning potential. *Avondale Industries, Inc. v. Pulliam*, 137 F 3d. 326, 328 (5th Cir. 1998)(finding that averaging several jobs offered by an employer was appropriate because the court has no way of determining which job the claimant will obtain and the average wage reflects all those jobs that are available); *Shell Offshore Inc. v. Cafiero*, 122 F.2d 312, 318 (5th Cir. 1997)(holding that averaging was a reasonable method to calculate a claimant's post-injury earning capacity).

In the present case, I find Employer has established suitable alternative employment as of September 21, 2001, the date of Dr. Stokes' original labor market survey. Dr. Stokes identified six specific jobs within the physical restrictions placed on Claimant in the FCE and by his doctors. In particular, the FCE indicated Claimant could perform frequent forward bending and occasional standing, stair climbing and repetitive squatting. He was functional in the light-medium category. Dr. Steiner felt Claimant could return to work based on the FCE. Dr. Hubbell testified Claimant was at more than sedentary work, and released him to perform whatever functions did not cause him pain. The only restrictions Dr. Hubbell placed on Claimant in addition to the FCE were no lifting more than 10 pounds away from the body and no prolonged sitting or standing. Dr. Hubbell testified Claimant was capable of light duty work, and possibly medium duty

work in some activities. He opined Claimant may even be able to return to heavy duty work if he received the proper medical treatment, which would render the FCE invalid.

The jobs identified by Dr. Stokes were all within the light-medium category. Each job provided for alternate sitting, standing and walking and no job required more than 20 pounds lifting. Although it is not clear if this lifting is away from the body, and thus outside the restrictions of Dr. Hubbell, I nonetheless find the jobs are suitable for Claimant. Additionally, Claimant has not established how he is incapable of performing these jobs. He also testified and told Dr. Stokes that his able to cut hair, which is a light duty position. Thus, it is reasonable to conclude Claimant would be able to perform the jobs listed in Dr. Stokes' labor market survey. I find these jobs were available to Claimant on September 21, 2001, as they were in his local community and appropriate considering his age, education and physical restrictions. Thus, I find Employer has established suitable alternative employment as of September 21, 2001.

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1040 (5th Cir, 1981). A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ). The claimant need not prove that he was turned down for the exact jobs the employer showed were available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities the employer reasonably showed were available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991). In the present case, Claimant testified he received the list of jobs Dr. Stokes sent him in September, 2001; however, he had not pursued any employment other than cutting hair and a temporary position as a part-time janitor at AME. Thus, I find Claimant has not participated in a diligent job search and has not rebutted Employer's suitable alternative employment. However, Claimant returned to work as a barber in August, 2001, earning an average of $100 per week.

E. Claimant's Post-Injury Wage Earning Capacity

In determining wage earning capacity Section 8(h) provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his true earning capacity. Where a claimant's post-injury employment is short lived, it does not constitute realistic and regular work available to a claimant in the open market, and as such does not truly reflect a claimant's post injury wage earning capacity. *Newport News Shipbuilding and Dry Dock Co. v. Stallings*, 250 F.3d 868, 872 (4th Cir. 2001) (finding that actual wages were not representative of wage earning capacity because of amount of overtime worked). The employer bears the burden

of proving post-injury earning capacity. *DM & IR Railway Co. v. Director, OWCP*, 151 F.3d 1120, 1122-23 (8th Cir. 1998); *Edwards v. Director, OWCP*, 999 F. 2d 1374, 1375 (9th Cir. 1993). Section 8(h) provides a two-step process to determine post-injury wage earning capacity. First, one must consider whether a claimant's post-injury wages accurately reflect actual wage earning capacity. If so, then the second step need not be reached. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984). If not, then one must consider the claimant's actual capacity for gainful employment. *Walsh v. Northfolk Dredging Co.*, 878 F.2d 380, 1989 WL 68806 (4th Cir. 1989)(Table). The Board has elicited some factors for consideration for each level of inquiry:

> The concept of a loss of wage-earning capacity encompasses more than a mere comparison of wages before and after an injury. Such factors as the beneficences [sic] of a sympathetic employer, the claimant's earning power on the open market, whether the claimant is required to expend more time, effort or expertise to achieve pre-injury production, and whether the claimant can perform his pre-injury physical work must all be taken into consideration.

Beck v. Newport News Shipbuilding and Dry Dock Co., 33 BRBS 543, 545 (1999)(*citing Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984)(*quoting Hughes v. Litton Systems, Inc.*, 6 BRBS 301, 304 (1977)).

In the present case, Claimant worked as a barber out of his home and at various salons from August, 2001, until approximately January, 2003. He testified he earned between $200 and $250 per week in August, 2001, but paid $125 per week for chair rental and supplies. Thus, Claimant actually earned $100 per week as a barber. When working out of his home, he also earned an average of $100 per week. Claimant testified he earned about $200 per week when he worked at Deluxe, resulting in actual wages of $75 per week after expenses. Between May and September, 2003, Claimant held a part-time janitorial job with AME which paid $6.75 per hour.

I find these wages as a barber and a part-time janitor do not accurately reflect Claimant's post-injury wage earning capacity. Employer has established suitable alternative employment as of September 21, 2001, which would pay Claimant an average of $225 per week. Claimant testified he cut hair because he enjoyed it, even though other jobs would pay him more. Moreover, Claimant's FCE indicated he was functional at light-medium duty work full-time. Therefore, I find Claimant was voluntarily under-employed. Employer's suitable alternative employment established Claimant was capable of earning $225 per week on the open market. I find this amount to be a more representative and accurate assessment of his post-injury wage earning capacity. However, as Employer did not establish suitable alternative employment until September 21, 2001, Claimant shall be entitled to partial disability from August 1 to September 20, 2001, based on his actual wages of $100 per week.

F. Average Weekly Wage and Claimant's Loss of Wage Earning Capacity

Section 10 of the Act establishes three alternative methods for determining a claimant's average annual earning capacity, 33 U.S.C. § 910(a)-(c), which is then divided by 52 to arrive at the average weekly wage. 33 U.S.C. § 910(d)(1) (2002); *Staftex Staffing v. Director, OWCP*, 237 F.3d 404, 407 (5th Cir. 2000), *on reh'g* 237 F.2d 409 (5th Cir. 2000); 33 U.S.C. § 910(d)(1) (2001). Where neither Section 10(a) nor Section 10(b) can be "reasonably and fairly applied" Section 10(c) is a catch all provision for determining a claimant's earning capacity. 33 U.S.C. § 910(c); *Louisiana Insurance Guaranty Assoc. v. Bunol*, 211 F.3d 294, 297 (5th Cir. 2000); *Wilson v. Norfolk & Western Railroad Co.*, 32 BRBS 57, 64 (1998).

Section 10(a) is applicable if the claimant has "worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." 33 U.S.C. § 910(a); *see also Ingalls Shipbuilding, Inc. v. Wooley*, 204 F.3d 616, 618 (5th Cir. 2000). Once a determination is made that the injured employee worked substantially the whole year, his average weekly earnings consists of "three hundred times the average daily wage or salary for a six-a-day worker and two-hundred and sixty times the average daily wage of salary for a five day worker." 33 U.S.C. § 910(a). If this mechanical formula distorts the claimant's average annual earning capacity it must be disregarded. *New Thoughts Fishing Co. v. Chilton*, 118 F.2d 1028, n.3 (5th Cir. 1997).

Here, the evidence is insufficient to determine Claimant's daily wages. It is not clear how many days he worked in the year prior to his injury. The wage records submitted into evidence only delineate the number of hours worked by Claimant, not the number of days. While most weeks Claimant earned overtime hours, there were a handful where he only worked 10 or 20 hours per week. Claimant testified he worked 5 days per week at Employer when he was first hired, but he did not testify as to how many days he worked at the time of his injury. Similarly, the record does not show how many days per week he worked at Southport, although Claimant testified he sometimes worked 10 or 12 hour days. I find § 10(a) cannot be fairly and reasonably applied to calculate Claimant's average weekly wage, given the inadequacies of the record.

As no evidence of the average weekly wage of a similar employee was submitted into evidence, I find § 10(c) is the best section under which to calculate Claimant's average weekly wage. The judge has broad discretion in determining the annual earning capacity under Section 10(c). *James J. Flanagan Stevedores, Inc. v. Gallagher*, 219 F.3d 426 (5th Cir. 2000). The prime objective of Section 10(c) is to "arrive at a sum that reasonably represents a claimant's annual earning capacity at the time of injury." *Gatlin*, 936 F.2d at 823; *Cummins v. Todd Shipyards*, 12 BRBS 283, 285 (1980). The amount

actually earned by the claimant is not controlling. *National Steel & Shipbuilding v. Bonner*, 600 F.2d 1288, 1292 (9th Cir. 1979). In this context, earning capacity is the amount of earnings that a claimant would have had the potential and opportunity to earn absent the injury. *Jackson v. Potomac Temporaries, Inc.*, 12 BRBS 410, 413 (1980).

Here, Claimant earned $9.18 per hour at the time of his accident. While working for Southport he earned $7.00 and then $8.00 per hour. I find it would be unfair to include these lower wages in the calculation of Claimant's average weekly wage, as they do not accurately reflect what he would have earned had he continued working at Employer. Thus, I find it is reasonable to determine Claimant's average weekly wage pursuant to what he was earning per week at Employer from December, 1998, through June, 1999. The record indicates Claimant earned a total of $6,905.66 during a total of nineteen weeks.[19] Dividing the number of weeks (19) into the amount earned ($6,905.66) yields an average weekly wage of $363.46 at Employer. I find this is an accurate reflection of what Claimant could have earned at Employer, and did earn in the year prior to his injury.

Claimant returned to work after his injury in August, 2001, as a barber earning $100 per week. Based on his average weekly wage of $363.46, I find he is entitled to a loss of wage earning capacity between August 1, 2001 and September 20, 2001, of $238.46. On September 21, 2001, Employer established suitable alternative employment available to Claimant which would have paid an average weekly wage of $225. Therefore, I find he is entitled to a loss of wage earning capacity of $138.46 from that date forward and continuing.

G. Medical Expenses

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a). The Board interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). A claimant establishes a prima facie case when a qualified physician indicates that treatment is necessary for a work-related condition. *Romeike v. Kaiser Shipyards*, 22 BRBS 57, 60 (1989). The test is whether or not the treatment is recognized as appropriate by the medical profession for the care and treatment of the injury. *Colburn v. General Dynamics Corp.*, 21 BRBS 219, 222 (1988). The employer bears the burden of showing by substantial evidence that the proposed treatment is neither reasonable nor necessary. *Salusky v. Army Air Force Exchange Service*, 3 BRBS 22, 26 (1975)(any

[19] This amount was computed by adding Claimant's 6/4/99 year to date earnings with the total amount he earned at Employer in December 1998. (See CX 5, p. 23-29).

question about the reasonableness or necessity of medical treatment must be raised by the complaining party before the ALJ). Medical care provided in an emergency situation is compensable, even if the doctor is not authorized by the employer. 33 U.S.C. § 907(c)(1)(C); *Roger's Terminal and Shipping Corp. v. Director, OWCP*, 784 F.2d 687 (5th Cir. 1985); *cert. denied*, 479 U.S. 826 (1986).

I have found Claimant's back injury is causally related to his 1999 workplace injury. As such, all medical treatment provided in relation to his back injury is compensable under § 7 of the Act, specifically including services provided by Dr. Hubbell. Moreover, I also find Claimant's emergency room services which were related to his leg or back injuries are compensable under § 7. Although Claimant was already authorized to seek treatment from Dr. Steiner or Dr. Hubbell, I find these services were provided in an emergency situation thus they need not be provided by an authorized physician. Nonetheless, I note that only those emergency services which relate to Claimant's workplace injuries are compensable. In Claimant's Exhibit 7, there are six entries which are not evidenced in the remainder of the record, or are not related to Claimant's workplace injuries. Specifically, emergency room records for visits on 7/6/02, 7/16/02, 6/2/03, 4/30/03, and 11/25/01 are not included in the record, thus, it is not possible to determine if these visits were related either to Claimant's leg or back injury. Additionally, the evidence contains records of emergency room visits on June 6, 2003 and November 25, 2001, for injuries secondary to a fist fight and chemical inhalation, respectively. As these visits are not related to Claimant's workplace injuries, I find they are not compensable under § 7 of the Act.

H. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six per cent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co.*, *aff'd in pertinent part and rev'd on other grounds, sub nom*. *Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)." This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

I. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to Section 908(b) of the Act for the period from June 29, 1999 through July 6, 1999; from July 9, 1999 through July 16, 1999; and from July 21, 1999 through July 31, 2001, based on an average weekly wage of $363.46 and a corresponding compensation rate of $242.31.

2. Employer shall pay to Claimant temporary partial disability compensation pursuant to Section 908(e) from August 1, 2001 through September 20, 2001, based on a loss of wage earning capacity of $238.46 and a corresponding compensation rate of $158.97.

3. Employer shall pay to Claimant temporary partial disability compensation pursuant to Section 908(e) of the Act for the period from September 21, 2001, to present and continuing, based on a loss of wage earning capacity of $138.46 and a corresponding compensation rate of $92.31.

4. Employer shall be entitled to a credit for all benefits paid to Claimant after June 28, 1999.

5. Employer shall pay Claimant for all past and future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

6. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated at a rate equal to the 52-week U.S.

Treasury Bill Yield immediately prior to the date of judgment in accordance with 28 U.S.C. §1961

7. Claimant's counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

A

CLEMENT J. KENNINGTON
ADMINISTRATIVE LAW JUDGE